No. 88-5986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO
JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Ohio Revised Code 2907.323(A)(3) prohibits, except by those having a proper purpose, the possession or viewing of nudity-oriented material which depicts a minor. The Ohio Supreme Court construed O.R.C. 2907.323(A)(3) in light of a challenged based on vagueness, overbreadth, and invasion of First Amendment rights of speech and privacy, to define the word "minor," to add an element of scienter, and to limit the prohibited materials to those depicting minors in lewd exhibition or graphic focus on the genitals. It construed "proper purpose" to mean a morally innocent purpose. The questions presented are:

(a) Whether a court may construe a statute so that the legislative purpose is no longer served;

(b) Whether a state may prohibit the private possession of child nudity-oriented materials where the nudity consists of a lewd exhibition or graphic focus on the genitals;

(c) Whether recklessness is sufficient scienter to justify punishment for possession or viewing of child nudity-oriented materials;

(d) Whether possession of such material may be prohibited consistent with First Amendment rights of speech;

(e) Whether "proper purposes," construed as morally innocent purposes, gives adequate notice of the conduct allowed and/or prohibited under a statute that is otherwise overbroad, vague, and violative of First Amendment rights of speech and privacy;

(f) Whether defining the materials which may not be possessed or viewed to include depiction of legal acts that are not obscene gives adequate notice of the nature of the materials prohibited.

II. Whether, where a statute prohibiting possession or viewing of depictions of nude minors is vague, overbroad and violates First Amendment rights of speech and privacy, a state supreme court may apply retroactively to a person convicted under such statute its own construction, where that construction substantially re-writes the statute.

III. One element of the offense of possessing nudity-oriented materials under R.C. 2907.323(A)(3) is that the photographs or performances possessed or viewed depict minors. The Ohio Supreme Court ruled that the photographs at issue in a prosecution under R.C. 2907.323(A)(3) are admissible automatically because they are the basis of the prosecution, and that the unauthenticated photographs may serve as the only evidence of the photographic subject's minority. The questions presented as a result of this ruling are:

(a) Whether the court may create a presumption of minority based upon the subject's appearance in the photographs which are the basis of the prosecution?

(b) Whether the court may place the burden on the accused to prove the absence of minority?

(c) Whether a lesser standard of proof may be used in prosecutions of child-nudity oriented prosecutions?

IV. Whether, consistent with the Fourth Amendment, material may be introduced in evidence after being seized on the basis of a search warrant based on triple hearsay that does not indicate a basis for believing the informants credible, and where the informants' statements do not indicate that the material is in the place to be searched or how recently the informants believe the owner of the place to have been in possession of the materials.

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State of Ohio v. Osborne, Court of Appeals, Franklin County, Ohio, Case No. 85AP-945

State of Ohio v. Young, State of Ohio v. Osborne, 37 Ohio St. 3d 249 (1988)

GROUNDS OF JURISDICTION

This is an appeal from a judgment of conviction rendered against Appellant in the Ohio Supreme Court, and from that court's refusal to re-hear its judgment. The Ohio Supreme Court affirmed Appellant's conviction under Ohio Revised Code 2907.323(A)(3).

The Ohio Supreme Court entered its Judgment on July 6, 1988, and its entry denying Appellant's request for re-hearing on August 31, 1988.

Appellant filed Notice of Appeal to this Court in the Ohio Supreme Court November 10, 1988.

Jurisdiction is grounded on 28 U.S.C. sec. 1257(2), since Appellant draws in question the validity, under the United States Constitution, of Ohio Revised Code 2907.323(A)(3), and of the Ohio Supreme Court's decision in the case at bar in favor of its validity.

Jurisdiction over this appeal is not affected by Public Law 100-352, June 27, 1988, 102 Stat. 662, which amends 28 U.S.C. sec. 1257(2). The Ohio Supreme Court's denial of a re-hearing was entered August 31, 1988. Sec. 7 of P.L. 100-352 indicates that P.L. 100-352 takes effect ninety days after June 27, 1988, which means September 25, 1988, and that it "shall not...affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

OHIO REVISED CODE 2907.323(A)(3)

ILLEGAL USE OF MINOR IN NUDITY-ORIENTED MATERIAL OR PERFORMANCE.

(A) No person shall do any of the following:

...

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or causes to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;...

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

Appellant, Clyde Osborne, a sixty-one-year-old man, had three polaroid photographs and one snapshot on page twelve of his personal photo album in the drawer of the desk in the bedroom of his own house. (R. 66) He was prosecuted for the possession of those photographs. Mr. Osborne was charged with the possession of nudity-oriented materials depicting a minor, a misdemeanor of the first degree under Ohio Revised Code sec. 2907.323(A)(3). Mr. Osborne entered a plea of not guilty.

Prior to trial, Mr. Osborne challenged the search warrant which had resulted in the discovery of the photographs, on the grounds that it was based on unreliable triple hearsay and failed to establish that the evidence sought was likely to be in his home at the time. (R. 33-40). Mr. Osborne also challenged in a motion *in limine* the admissibility of the photographs for the purpose of proving the age of the person depicted. (R. 14-17). Mr. Osborne also challenged the constitutionality of O.R.C. 2907.323(A)(3) on the grounds that it was vague and overbroad and infringed upon his First Amendment rights. (R. 3-7). The trial court overruled each of these pre-trial motions.

Mr. Osborne was tried before a jury of eight. (R. 40; 122). At trial the four photographs seized from Mr. Osborne's album were admitted into evidence over his objection. (R. 68-73). Mr. Osborne moved for a judgment of acquittal on the grounds that the state had failed to prove that the photographs depicted an actual person who was a minor. (R. 112-115). The trial court overruled this motion and submitted the case to the jury. The jury returned a guilty verdict. (R. 125). The trial court sentenced Mr. Osborne to the maximum possible jail term--six months. (R. 130).

a guilty verdict. (R. 125). The trial court sentenced Mr. Osborne to the maximum possible jail term--six months. (R. 130).

Mr. Osborne appealed his conviction to the Tenth District Court of Appeals where he again challenged (1) the constitutionality of O.R.C. 2907.323(A)(3) on the basis of vagueness, overbreadth, and violation of rights of speech and privacy; (2) the validity of the search warrant; and (3) the use of the unauthenticated photographs, which were the basis of the prosecution, to prove the age of the photographic subject. The Tenth District Court of Appeals affirmed Mr. Osborne's conviction.

Mr. Osborne appealed to the Ohio Supreme Court, where he raised the issues that he had raised in the Court of Appeals. The Ohio Supreme Court construed O.R.C. 2907.323(A)(3) in an attempt to meet constitutional standards. It rewrote the statute to include an element of scienter, to define the age of minority, and to limit the regulated materials to depictions of minors in which the nudity "constitutes a lewd exhibition or involves a graphic focus on the genitals," and construed the proper purposes for which such materials may be possessed as "morally innocent." It ruled that no evidence of minority, other than the photographs which were the basis of the prosecution, need be offered to meet the state's burden of proof. The Ohio Supreme Court affirmed Mr. Osborne's conviction and subsequently denied his motion for re-hearing.

Mr. Osborne now timely appeals to this Court. The Ohio Supreme Court has granted him an appeal bond pending the outcome of this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. VAGUENESS, OVERBREADTH, AND THE FIRST AMENDMENT

(a) Overbreadth. Ohio Revised Code 2907.323(A)(3) says that no person shall "possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity" unless for a "proper purpose" or with the permission of the child's legal guardian. This statute is titled "Illegal use of a minor in nudity-oriented material." It was enacted with the recognition that materials depicting nude minors are not necessarily obscene or pornographic and that they are not necessarily harmful to the children appearing therein. This is clear from the fact that the materials themselves are not made illegal but rather that the classes of people who may possess or view them are limited. Nudity is defined in O.R.C. 2907.01(H) as

> the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

This statutory definition of nudity describes exactly the nature of the materials addressed by O.R.C. 2907.323(A)(3). The legislative intent was to address all materials and performances involving child nudity. Obscene and sexually oriented materials were covered by other statutes. The fact that this was the legislative intent is demonstrated by the list of exceptions to criminal liability in O.R.C. 2907.323(A)(3)(a).

O.R.C. 2907.323(A)(3) limits the dissemination of materials featuring nude minors to those who would possess or view them for

"proper purposes." Had the General Assembly intended to limit the matters addressed to child pornography, there would have been no logic in creating exceptions for parents, guardians, artists, scientists, or doctors. While any of these persons might have a legitimate interest in having a photograph of a naked child, they could not claim a legitimate interest in a pornographic photograph of a child.

Appellant challenged the constitutionality of O.R.C. 2907.323(A)(3) as overbroad, because it punished possession or viewing of First Amendment-protected materials. The Ohio Supreme Court, addressing this challenge, applied the wrong test for overbreadth. It found that O.R.C. 2907.323(A)(3) prohibits "conduct rather than pure speech." (at p. 251) It thus concluded that the overbreadth, to be unconstitutional, must be substantial. (at p. 251). The only "conduct" prohibited by O.R.C. 2907.323(A)(3) is "possession" or "viewing." Viewing a photograph is the same as reading a book. Possessing a photograph in order to view it is an integral part of viewing it. Thus, O.R.C. 2907.323(A)(3) punishes pure speech. In this context, "a constitutional distinction between speech and conduct is specious." Commonwealth v. Oakes, 401 Mass. 602, 518 N.E.2d 836, 837 (1988).

Applying this erroneous standard, the Ohio Supreme Court said (at 251) that O.R.C. 2907.323(A)(3) is not overbroad since the "proper purposes," which it found to be affirmative defenses, narrow its scope. Even under the Court's erroneous "conduct" analysis, however, the "proper purposes" do not narrow the scope of O.R.C. 2907.323(A)(3). The "proper purposes" do not relate to any of the words used to define the offense. Understanding these defenses does not aid in understanding the acts prohibited.

(b) Privacy. O.R.C. 2907.323(A)(3) encompasses private possession or viewing. This Court held in Stanley v. Georgia, 394 U.S. 557, 559 (1969), that "the mere private possession of obscene matter cannot constitutionally be made a crime." Under O.R.C. 2907.323(A)(3), the material possessed need not be obscene. Thus, there is even less basis for infringing the possessor's privacy right than where the material is constitutionally unprotected. "If the First Amendment means anything," this Court said in Stanley, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 394 U.S. 565.

The statute upheld by this Court in New York v. Ferber, 458 U.S. 747 (1982), prohibited production, sale, or advertising. It did not prohibit possession or viewing. Thus, in Ferber, this Court did not address the issue of private possession or viewing.

(c) Lack of Scienter. O.R.C. 2907.323(A)(3) is overbroad for the additional reason that it lacks a requirement of scienter. "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material." Mishkin v. New York, 383 U.S. 502, 511 (1966). The trial judge in the case at bar, however, did not instruct the jury that it need find any culpable mental state. He said that this was a strict liability offense. The Ohio Supreme Court construed the statute to require proof of "notice" to the accused of the character of the depiction, which, it said, amounted to a mental state of recklessness. (at p. 253).

A "recklessness" standard, however, is insufficient to avoid the hazard of self-censorship. Scienter protects against self-censorship because the individual knows that the material is of a certain type. "Recklessness" in Ohio requires only that there be a "known risk" that circumstances "are likely to exist." (at p.

253). It does not require that the accused know that the material is of a certain type. It requires only that the accused be aware of a risk that the material might be of a certain type. This puts the individual into precisely the situation of self-censorship that this Court said in Mishkin must be avoided. This Court has said that "knowledge of the content of the materials" is required. Hamling v. United States, 418 U.S. 87, 123 (1974).

(d) Possession or Viewing. This Court in Ferber v. New York, 458 U.S. 747 (1982), upheld against a First Amendment challenge a statute prohibiting production, sale, or advertising. O.R.C. 2907.323(A)(3) prohibits possession and viewing. Thus, O.R.C. 2907.323(A)(3) is broader than the statute upheld in Ferber. This Court's rationale in Ferber was that distribution was an integrally related to sexual abuse of children. 458 U.S. 759. Possession and viewing are not nearly so related to the production of the items in question. The use in O.R.C. 2907.323(A)(3) of the word "view" is particularly overbroad. That term is not defined in Ohio statutory or case law. If a depiction prohibited by O.R.C. 2907.323(A)(3) were on a billboard, each passerby would "view" it. O.R.C. 2907.323(A)(3) does not specify that a person must "view" for longer than a fleeting second. It does not specify that the person intend to "view." O.R.C. 2907.323(A)(3) does not limit its scope to children located in Ohio at the time the photographs are produced. Those are the only children in which Ohio has a legitimate interest. O.R.C. 2907.323(A)(3) does not require that the child depicted be alive at the time of possession or viewing by the accused.

Despite its conclusion that O.R.C. 2907.323(A)(3) is not overbroad as regards its prohibition against depictions of nudity, the Ohio Supreme Court attempted a narrowing construction

of the term "nudity." It said that O.R.C. 2907.323(A)(3) applies only where the "nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." (at 252). In New York v. Ferber, 458 U.S. 747, 765 (1982), this Court said that a state might constitutionally proscribe a depiction of "lewd exhibition of the genitals." The Ohio Supreme Court does not limit "lewd exhibition" to the genitals but construes O.R.C. 2907.323(A)(3) to prohibit a "lewd exhibition" generally. The Ohio Supreme Court's only apparent definition of "lewd exhibition" is that it is "conduct which is not morally innocent, i.e., the possession or viewing of the described material for prurient purposes." (at 252)(Emphasis in original.) The Ohio Supreme Court did not make it clear how "moral innocence" served to limit "nudity."

"Graphic focus on the genitals" also fails to limit "nudity." "Graphic focus on the genitals" is a phrasing original with the Ohio Supreme Court. It goes beyond the kind of depiction that this Court said in Ferber, id., could constitutionally be prohibited. "Graphic focus on the genitals" does not limit "nudity" in any ascertainable way. "Graphic" is not defined by Ohio statutory or case law. "Graphic" is a word that refers to a writing that is so vivid that it provides an impression similar to that of a picture. "Graphic" cannot be used to refer to a visual depiction or performance. Moreover, as an adjective modifying "focus," "graphic" makes no sense. Webster's Third New International Dictionary (unabr. 1986). Possibly the Ohio Supreme Court means by "graphic" to emphasize "focus" in some way, but in just what way is not clear. "Focus" too is unclear in this context. Possibly the Ohio Supreme Court means something narrower than any depiction of a nude person in which the genitals are visible. "Focus" on the genitals could mean that genitals are at the center of the depiction, or that the depiction is done in

such a way as to direct the viewer's eye to the genitals. It could simply refer to the viewer's perspective. It is not clear that the phrase "graphic focus on the genitals" imposes any limitation on the term "nudity."

The Ohio General Assembly enacted other statutes to prohibit the possession of child pornography and obscenity. O.R.C. 2907.321(A)(5) punishes the possession of "any obscene material, that has a minor as one of its participants." O.R.C. 2907.322 criminalizes the possession of "any material that shows a minor participating or engaging in sexual activity, masturbation or bestiality" (upheld by the Ohio Supreme Court in State v. Meadows, 28 Ohio St. 3d 43, 503 N.E.2d 697, cert. den. 480 U.S. __, 107 S.Ct. 1581, 94 L.Ed.2d 771 (1987). The legislative intent behind O.R.C. 2907.323(A)(3) was to limit dissemination of depictions of child nudity. It was not to regulate the content of such materials. The Ohio Supreme Court's construction has altered the function of O.R.C. 2907.323(A)(3) so that it no longer reflects the legislative intent.

A court may limit an overbroad statute. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). But to do so, a court may not take such liberties as to distort a statute's original meaning. As the New Hampshire Supreme Court said in a decision affirmed by this Court, "'words, provisions, or modifications' may not at all events be read into a law to the end that it may be clothed with constitutional validity." State v. Cox, 16 A.2d 508, 513 (1940), affirmed as Cox v. New Hampshire, 312 U.S. 569 (1941). The New Hampshire Supreme Court there cited a previous decision in which it said that the doctrine of giving a limiting construction to preserve constitutionality "affords no warrant for giving the statute a meaning that the legislature did not intend." State v. Gerry, 38 A. 272, 276 (1896).

The Massachusetts Supreme Judicial Court was confronted with a statute that prohibited production of depictions of child nudity. It decided, like the Ohio Supreme Court, that a prohibition relating to depictions of child nudity was overbroad. But the Massachusetts court held the statute unconstitutional. Commonwealth v. Oakes, 401 Mass. 602, 518 N.E.2d 836, 838 (1988). That is the proper approach. A statute prohibiting distribution of depictions of child nudity is so clearly overbroad that it cannot be rendered constitutional by construing it to prohibit "lewd exhibition," which is quite different from the purpose of O.R.C. 2907.323(A)(3).

(e) Proper Purposes. The proper purposes for which materials or performances depicting child nudity may be possessed or viewed are, according to O.R.C. 2907.323(A)(3):

> (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

The Ohio Supreme Court failed to say what religious, artistic, educational, medical, scientific, governmental, or judicial purposes are "bona fide" or how that determination is to be made. It failed to note how other purposes will be assessed for propriety. It did not define proper interests.

The Ohio Supreme Court held that the function of the proper purposes exception "is to sanction the possession or viewing of

material depicting nude minors where that conduct is morally innocent." Few would anticipate that their religious or artistic purpose was not "bona fide" and therefore not morally innocent.

The materials and performances addressed by O.R.C. 2907.323(A)(3), according to the construction by the Ohio Supreme Court, must depict nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals." (at 252). Neither the Ohio Supreme Court nor O.R.C. 2907.323(A)(3) provides any guideline for determining when the possession of such material is "morally innocent." The phrase "moral innocence" is so fraught with vagueness that no person can guess at its meaning. Every person accused under O.R.C. 2907.323(A)(3) will be subject to the judge's or jurors' assessment of the morality of his purpose in possessing or viewing the regulated materials. The absence of moral innocence cannot be the basis for determining legal guilt.

(f) Age of Minority. O.R.C. 2907.323(A)(3) prohibits the possession or viewing of materials or performances featuring nude minors. It fails to define the age of minority. The Ohio Supreme court construed "minor" to mean " a person under eighteen years of age." (at p. 249). As a result, O.R.C. 2907.323(A)(3) now punishes those who possess or view non-obscene materials or performances which depict legal acts. In Ohio, the age of consent for sexual conduct is fifteen years. O.R.C. 2907.04. Under the Ohio Supreme Court's construction, a person is punishable for possessing or viewing materials or performances depicting legal acts. The Court created the untenable situation in which it is legal to engage in sexual activity with a fifteen-year-old but criminal to retain a photograph of the activity.

If a "statute uses words of no determinative meaning," this Court said in Winters v. New York, 333 U.S. 507, 516 (1948), but

encompasses acts "which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." A criminal statute is unconstitutionally vague if it is so indefinite "that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The constitutional infirmities of vague penal statutes are threefold. They fail to provide fair notice to the accused. United States v. Harris, 347 U.S. 612, 627 (1954). They fail to set clear guidelines for those charged with their administration, resulting in arbitrary enforcement. Smith v. Goguen, 415 U.S. 556, 572-73 (1974). They often proscribe conduct that is innocent. Papachristou v. Jacksonville, 405 U.S. 156, 163 (1972). The standard for vagueness is particularly strict where First Amendment rights are involved, Smith v. California, 361 U.S. 147, 151 (1959), because of the chilling effect of a vague statute on those rights.

This Court has recognized that one person's art may be another's obscenity, and one person's religion may be another's heresy. It is impossible to determine under what circumstances any person may legally possess or view the materials described in O.R.C. 2907.323(A)(3).

The Ohio Supreme Court attempted to construe O.R.C. 2907.323(A)(3) to cure its vagueness. It failed in this effort. Like the New York Court of Appeals in Winters v. New York, it tried to limit a vague statute, but its words of limitation are themselves vague. Thus, the limiting construction "is not an effective notice of new crime." Winters v. New York, 333 U.S. 507, 519 (1948).

II. RETROACTIVE APPLICATION

Appellant was convicted under a statute that (a) prohibited possession or viewing of depictions of nude minors, (b) did not designate the age of minority, and (c) contained no element of scienter.

(a) Nudity. Appellant was convicted at trial on the basis of proof of possession of photographs that depicted a person found by the trial court to be a minor. The character required by the statute and by the trial court of the nature of the photographs was that they depict nudity. Only at the level of the state supreme court was it determined that the character of the photographs should be "lewd exhibition" or "graphic focus on the genitals." This is quite different, as indicated above, from the "nudity" required by the statute and by the trial court. The trial judge instructed the jury that "nudity" meant "the showing, representation, or depiction of human male genitals, pubic area or buttocks with less than a full opaque covering." Before trial and at trial, Appellant had no way of knowing that "lewdness" or "graphic focus" were what was prohibited.

The Ohio Supreme Court, as indicated above, attempted to narrow O.R.C. 2907.323(A)(3) by defining "nudity" to exclude "morally innocent" behavior. At the time of the alleged offense and at trial, Appellant had no way of knowing that lack of "moral innocence" was an element of the offense.

The Ohio Supreme Court said, regarding the character of the material whose possession or viewing is prohibited by O.R.C. 2907.323(A)(3), that it must constitute a "lewd exhibition," which it said meant "conduct which is not morally innocent, i.e., the possession or viewing of the described material for prurient purposes." (at 252)(Emphasis in original.) The Court thus made

prurient purpose an element of the offense. But at trial the jury was not told that prurient purpose or lack of moral innocence were elements. Appellant did not defend himself against a charge that he had a prurient purpose or lacked moral innocence because at the time of trial he did not know that these were elements of the offense.

(b) Age of Minority. The Ohio Supreme Court decided that the age of minority for purposes of O.R.C. 2907.323(A)(3) was eighteen years, that is, that what was prohibited was possession of a depiction of a person below the age of eighteen. The statute is silent as to age. The age of consent for sexual relations is fifteen years. "Corruption of a minor," an offense in the same chapter, O.R.C. 2907.04, uses the age of fifteen as the age below which sexual acts with a person are prohibited. No one reading the given chapter could conclude that eighteen would be the relevant age for liability under O.R.C. 2907.323(A)(3). Only at trial was it determined by the court, and upheld on appeal, that eighteen was the relevant age.

(c) Lack of Scienter. The trial judge did not instruct the jury that it need find any culpable mental state. The trial court treated O.R.C. 2907.323(A)(3) as a strict liability offense. The Ohio Supreme Court, on the other hand, construed it to require proof of "notice" to the accused of the character of the depiction, which, as it explained, amounted to a mental state of recklessness. Appellant, at the time of the alleged offense and at time of trial, had no idea of what mental state would subsequently be required for conviction.

(d) Law Applicable to Retroactive Construction. The act of which the Ohio Supreme Court deemed Appellant guilty differs, in these important respects, from the act of which the trial court convicted him. A person may not be convicted under a statute that

receives only on appeal in his case a "constitutionalizing" construction that differs in significant respects from the statute as written. When this occurs, the accused has not had the opportunity at trial to address what ultimately are determined to be the elements of the offense. It further denies the accused the right to have a jury determine his guilt or innocence based on the elements of the offense. U.S. Constitution, Amendment VI.

In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), this Court let stand a New Hampshire conviction under a statute prohibiting opprobrious language, only because the New Hampshire Supreme Court, had previously construed the statute to apply to fighting words only. Referring to the New Hampshire Supreme Court's rulings on the statute in question, this Court said: "On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace,..." 315 U.S. 573 (Emphasis supplied). In Gooding v. Wilson, 405 U.S. 518, 522-23 (1971), this Court cited Chaplinsky as controlling authority on that point. In Gooding, this Court said that in Chaplinsky the New Hampshire Supreme Court had limited the statute long before the words for which Chaplinsky was convicted.

This Court stated in Dombrowski v. Pfister, 380 U.S. 479, 492 (1965), that "the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute." (Emphasis supplied.) A limiting construction must be provided before the accused may be charged and tried. Neither a trial nor appellate court may give a limiting construction that substantially changes the elements of the offense and apply it retroactively to the accused.

In Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), this Court held that where a state supreme court construes, to render

it constitutional, a facially invalid statute regulating speech activity, the conviction in the instant case must be overturned. The statute in that case permitted local authorities to refuse a parade permit with little limitation on their discretion. The state supreme court construed the statute to require more definite criteria. This Court said that though the statute as construed by the state supreme court was constitutionally valid, the conviction in that case had to be overturned, since the accused could not have known at the time of trial what the state supreme court would ultimately find the statute to mean. "It would have taken extraoddinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later." 394 U.S. 156. Appellant in the case at bar is in the same situation as Shuttlesworth.

III. EVIDENCE OF MINORITY

One element of the offense described in O.R.C. 2907.323(A)(3) is that the photographs or performances viewed or possessed involve minors. At the time of Appellant's trial, minority had not been defined although the age of consent in Ohio (for sexual relations) is fifteen years. The Ohio Supreme Court construed "minor" in its opinion in this case to mean a person under eighteen years of age for purposes of O.R.C. 2907.323(A)(3). (at 252).

At trial the state offered into evidence to prove the age of the person depicted four photographs marked State's Exhibits 1A, 1B, 1C, and 1D. (R. 68). Appellant asked that these photographs be excluded from evidence, in a motion in limine (R. 14-17) that was overruled. (R. 68-73). No foundation was laid to establish that the photographs were true and accurate depictions of the subject matter. No other evidence was offered to identify the person depicted or to establish that person's age at the time the photographs were taken. No evidence was offered to establish that the subject matter depicted was a real person rather than an invention of technological manipulation. Despite the failure to lay a proper foundation for admissibility, the photographs were admitted over Appellant's objection. (R. 73).

The Ohio Supreme Court ruled that the photographs that were the basis of the prosecution were relevant and therefore admissible, without any authentication to prove that they accurately portrayed the subject matter depicted. (at 258). The Ohio Supreme Court held that these unauthenticated photographs could be used as the only proof of the photographic subject's age. (at 258). The Ohio Supreme Court did not even require proof that the subject matter was a depiction of a real person.

Unauthenticated photographs are not admissible in any other type of criminal case or evidentiary proceeding in Ohio. Cincinnati, Hamilton and Dayton Ry. Co. v. DeOnzo, 87 Ohio St. 109 (1912), State v. Hannah, 54 Ohio St. 2d 84, 88 (1978).

Other states in prosecuting child pornography cases have required proof of the photographic subject's age. One commentator noted:

> Where the age of the child cannot be proven through the child's testimony, this element of the offense has been proven with circumstantial evidence, usually expert testimony, preferably by a pediatric endocrinologist. The expert can visually examine the photographs and identify the child's age based on five distinct states of adolescent pubertal development. The effectiveness of this testimony depends on the clarity, lighting, and angle of the photograph. Note, Child Protection Act of 1984 - Enforceable Legislation to Prevent Sexual Abuse of Children, 10 Okla. City U. L. Rev. 121, 135 (1985).

The Ohio Supreme Court, by failing to require authentication, has permitted conviction on the basis of proof less than proof beyond a reasonable doubt. The state must establish every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). The Ohio Supreme Court has effectively created a presumption that any photographic subject who appears to be a minor is a minor for purposes of prosecution under O.R.C. 2907.323(A)(3) and has placed the burden on the accused to show that the photographic subject is over the age of eighteen. This Court, in Sandstrom v. Montana, 442 U.S. 510, 524 (1979), rejected a jury instruction that could have been understood as shifting the burden of persuasion on the element of intent. A state may not shift to the accused the burden of proving an element of a crime charged. Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Ohio Supreme Court ruled that "the relevance of the photographs [admitted in this case] is not dependent on whether they accurately depict the subject matter portrayed, but

on...whether they are the sort of material outlawed by R.C. 2907.323(A)(3)." (at 258). The type of material outlawed by O.R.C. 2907.323(A)(3) is that which depicts minors. The Ohio Supreme Court further held that the minority of the person depicted was established in the case at bar because

> The majority of the photographs speak for themselves. The person depicted is obviously under the age of eighteen...and a jury would have been clearly justified in finding, beyond a reasonable doubt, that the subject was a minor. As possession of these photographs alone would support appellant's conviction we need not consider whether the state proved the minority of the subject in the sole remaining photograph. (at 258)(Emphasis supplied).

The purpose of O.R.C. 2907.323(A)(3) is to protect minors. The fact that a model in a photograph may appear to be a minor is no proof of minority. It is the state's burden to prove minority. A presumption based upon appearance does not meet this burden, nor does it serve the statute's purpose of protecting minors.

IV. SEARCH WARRANT

The photographs introduced in evidence against Appellant were seized by Columbus police during a search of his home. The search was conducted pursuant to a warrant whose affiant was Detective James Phillips of the Columbus Division of Police. That warrant was defective in two respects. U. S. Constitution, Amendment VI.

First, the warrant was based on triple hearsay. Detective Phillips recited that all the information contained in his affidavit came from a U.S. postal inspector in Cleveland, Ohio, named Paul M. Hartman. According to Phillips, Hartman received his information from a U.S. postal inspector in Florida, named Daniel Witouski. Phillips affirmed that Hartman told him that Witouski had told Hartman that two persons under arrest in Florida (Jack S. Smith and Daniel S. Knous) had told him that certain photographs were in possession of Appellant. The warrant did not recite facts to indicate that either informant might be credible.

Second, the statements of Smith and Knous did not reliably indicate that the photographs would be in Appellant's home. The statement of Smith regarding photographs was "they're with a friend of mine in Ohio named Clyde." The statement of Knous was that they were in possession of Clyde Osborne. Neither informant indicated that the material would be in Appellant's home. Neither indicated any basis for knowing that the material was presently in Appellant's possession, as opposed to knowing that he had had it at some time in the past. Aguilar v. Texas, 378 U.S. 108 (1964); McCray v. Illinois, 386 U.S. 300 (1967).

CONCLUSION

O.R.C. 2907.323(A)(3) is, to counsel's knowledge, the broadest statute in any United States jurisdiction containing prohibitions relating to depictions of child nudity. O.R.C. 2907.323(A)(3) omits any scienter standard, does not specify age of minority, and does not specify sexual conduct. The Illinois statute at issue in Geever v. Illinois, 112 Ill.2d 313 (1988), dismissed for want of jurisdiction, __ U.S. __ (October 31, 1988), did not prohibit mere "viewing," did specify the age of minority, did require knowledge of the character of what was depicted, and did specify prohibited sexual acts beyond mere nudity. The Ohio Supreme Court's effort in its decision below to construe O.R.C. 2907.323(A)(3) to render it constitutional involved a substantial re-writing that violated the statute's purpose and did not solve its vagueness or overbreadth.

Even if this Court should find the Ohio Supreme Court's construction of O.R.C. 2907.323(A)(3) to render it constitutionally valid, that construction may not constitutionally be applied to Appellant.

The Ohio Supreme Court required no authentication of the photographs that served as the basis for the prosecution, or introduction of any other evidence, to prove the age of the person depicted. It thereby violated constitutional requirements regarding proof of elements of offenses.

Finally, the Ohio Supreme Court refused to find error in introduction of photographs seized pursuant to a defective warrant.

For these four reasons, Appellant asks this Court to find that the questions presented are substantial and to give plenary consideration to his appeal.

Respectfully submitted,

S. ADELE SHANK
Ohio Public Defender Commission
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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Jurisdictional Statement was served upon the offices of Ronald J. O'Brien, City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and on Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio 43215, by regular U.S. mail on this 10th day of November, 1988.

S. Adele Shank

S. ADELE SHANK
Counsel for Appellant

88-5983

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF OHIO

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Appellant, Clyde Osborne, through counsel, respectfully requests leave to file his appeal from the Supreme Court of Ohio without prepayment of costs or fees and to proceed in forma pauperis, pursuant to Rule 46.

Appellant was found to be indigent by the Municipal Court of Franklin County, Ohio, which permitted him to proceed in forma pauperis, represented by the Public Defender of Franklin County, Ohio. On appeal, Appellant has been represented at no cost by the Clinical Program of the College of Law, Ohio State University.

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SUPREME COURT, U.S.

Appellant's affidavit in support of this motion is attached hereto.

Respectfully submitted,

S. ADELE SHANK
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion for Leave to Proceed in Forna Pauperis was forwarded by ordinary U.S. Mail to Ronald O'Brien, City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio 43215, this 14th day of November, 1988. I further certify that all parties required to be served have been served.

S. ADELE SHANK
Assistant State Public Defender

COUNSEL FOR APPELLANT

88-5996

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

RECEIVED
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SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Clyde Osborne, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes - Part Time

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Social Security $250.00 Mo. Title V Program
~~$268.00 Mo Senior Community Svc~~ Employment Program
(Before Taxes) 1393 East Broad St. Suite 104
Columbus Ohio 43205.
Assigned Godman Guild 2nd Ave
Senior Dimension Center Litecam

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Social Security As Mentioned Above.

3. Do you own any cash or checking or savings account?

Yes

a. If the answer is yes, state the total value of the items owned. $75.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

1981 Sabaru - $100.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

_____

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clyde Osborne.
CLYDE OSBORNE

SUBSCRIBED AND SWORN To before me this 18th day of November, 1988.

Mary Carol Peirano
NOTARY

My Commission expires: MARY CAROL PEIRANO
Notary Public
My Commission Expires Dec. 30, 1992

IN THE SUPREME COURT OF OHIO

Clyde Osborne,	:	
Appellant,	:	
v.	:	Case No. 86-1728
State of Ohio,	:	
Appellee.	:	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Clyde Osborne hereby serves notice that he appeals to the Supreme Court of the United States, under 28 U.S.C. § 1257(2), from the decision of this Court of August 31, 1988, in which it denied his motion to re-hear its Judgment of July 6, 1988, and from said Judgment, which affirmed his conviction.

Respectfully submitted,

S. Adele Shank
Assistant State Public Defender
Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

John Quigley
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FILED
NOV 10 1988
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

OF COUNSEL:

David Goldberger
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College of Law
Clinical Programs
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Columbus, Ohio 43210
(614) 292-6821

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Notice of Appeal was served upon the offices of Ronald J. O'Brien, City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and of Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio 43215, by regular U.S. Mail on this 10th day of November, 1988.

S. ADELE SHANK - 0022148

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: October 12, 1988

State of Ohio, Appellee,	:	Case No. 86-1728
v.	:	E N T R Y
Clyde Osborne, Appellant.	:	(Franklin County)

UPON CONSIDERATION of the motion filed by counsel for appellant to withdraw this Court's mandate to the Court of Appeals, or, to stay execution of the mandate, pending the appellant's appeal to The United States Supreme Court,

IT IS ORDERED that the motion for withdrawal of mandate be, and the same is hereby, denied.

IT IS FURTHER ORDERED by the Court that execution of the mandate and sentence be, and the same are hereby, stayed pending the timely filing of an appeal to The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such appeal is timely filed, this stay shall continue for an indefinite period pending final disposition of this cause by The Supreme Court of the United States.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: August 31, 1988

State of Ohio, Appellee,	:	Case No. 86-1728
v.	:	REHEARING ENTRY
Clyde Osborne, Appellant.	:	(Franklin County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 31st day of August, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: July 6, 1988

State of Ohio, Appellee,	:	Case No. 86-1728
v.	:	JUDGMENT ENTRY
Clyde Osborne, Appellant.	:	CERTIFIED BY THE COURT OF APPEALS

This cause, here on certification by the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Appeals for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 85AP945)

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 6th day of July, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

THE STATE OF OHIO, APPELLEE, v. YOUNG, APPELLANT.

THE STATE OF OHIO, APPELLEE, v. OSBORNE, APPELLANT.

[Cite as State v. Young (1988), 37 Ohio St. 3d 249.]

Criminal law—Prohibition of possession or viewing of material or performance of minor in state of nudity—R.C. 2907.323(A)(3) is constitutional—"Minor," construed—Culpable mental state of recklessness required—"Proper purposes" exceptions are affirmative defenses.

0.3ur 3d Criminal Law §§ 1860, 1877.6

1. R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.
2. The term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.
3. Recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3).
4. The "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2).

(Nos. 86-1532 and 86-1728—Submitted May 3, 1988—Decided July 6, 1988.)

CERTIFIED by the Court of Appeals for Franklin County, Nos. 85AP-1033 and 85AP-945.

In case No. 86-1532, Columbus police officers applied for a warrant to search the residence of defendant-appellant, Denis Young. The facts contained in the affidavit for the warrant were provided to police by two male minors who had been arrested on separate occasions for being a runaway and for male prostitution, respectively. Both informants reported that they had been picked up by Young and taken to Young's home, that Young had taken nude photographs of them, and that they had engaged in sexual acts with Young. Further, both informants reported that they had observed photographs in Young's house of nude minors or of minors engaged in sexual activity.

The warrant was executed on March 21, 1985. Various items were seized, including four photographs of one of the informants. Young was subsequently charged with possession of material depicting a minor in a state of nudity in violation of R.C. 2907.323 (A)(3).

Young filed a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional. He also moved to suppress the evidence seized pursuant to the search, alleging that the search warrant was issued without probable cause. Both motions were overruled, the motion to suppress after a hearing. Young thereafter entered a plea of no contest and was found guilty of the charge set forth in the indictment. Upon appeal, the court of appeals affirmed Young's conviction, upholding the constitutionality of R.C. 2907.323(A)(3).

In case No. 86-1728, Columbus police secured a warrant to search the residence of defendant-appellant, Clyde J. Osborne. The warrant was issued pursuant to an affidavit sworn by Detective James A. Phillips of the Columbus Police Department. The information recited in the affidavit was based on a conversation between Phillips and an Ohio postal inspector. The inspector informed Phillips that a Florida postal inspector had arrested two persons in that state who, during interrogation, implicated Osborne as having photographic negatives of child pornography in his possession.

The warrant was executed on July 22, 1985, resulting in the seizure of, *inter alia*, photographs of nude male minors. Osborne was subsequently charged with a violation of R.C. 2907.323(A)(3).

Osborne filed various pretrial motions, including a motion to dismiss the indictment on the basis that R.C. 2907.323(A)(3) is unconstitutional, and a motion to suppress the evidence seized during the search. These motions were overruled and, after a jury trial, appellant was found guilty as charged.

Upon appeal, the court of appeals upheld the constitutionality of R.C. 2907.323(A)(3) and affirmed Osborne's conviction.

By separate entries, the appellate court, finding its judgments in case Nos. 86-1532 and 86-1728 to be in conflict with the judgment of the Court of Appeals for Hamilton County in *State* v. *Meadows* (Dec. 18, 1985), No. C-850091, unreported, certified the record of each case to this court for review and final determination.

Ronald J. O'Brien, city attorney, for appellee.

Andrea R. Yagoda, for appellant in case No. 86-1532.

Richard Cartner, for appellant in case No. 86-1728.

S. Adele Shank, for appellants.

DOUGLAS, J. The question certified to this court in the two cases before us today is whether the state, consistent with the First Amendment to the United States Constitution, may outlaw the private possession of child pornography. This question has since been answered in the affirmative in *State* v. *Meadows* (1986), 28 Ohio St. 3d 43, 28 OBR 146, 503 N.E. 2d 697. The syllabus in *Meadows* reads:

"R.C. 2907.322(A)(5), which prohibits the knowing possession or control of material which shows a minor participating or engaging in sexual activity, masturbation, or bestiality, does not violate the First Amendment to the United States Constitution, as made applicable to the states by reason of the Fourteenth Amendment. (*Stanley* v. *Georgia* [1969], 394 U.S. 557, and *New York* v. *Ferber* [1982], 458 U.S. 747, construed, harmonized and followed.)"

Our ruling in *Meadows* concerned the constitutionality of R.C. 2907.322(A)(5), while the cases before us today involve a related statute, R.C. 2907.323(A)(3). However, shortly after *Meadows* was decided, this court issued judgment entries in two cases involving R.C. 2907.323(A)(3), both of which were resolved solely on the authority of *Meadows*. *State* v. *Modern* (1986), 28 Ohio St. 3d 64, 28 OBR 164, 502 N.E. 2d 634; *State* v. *Robinson* (1986), 28 Ohio St. 3d 65, 28 OBR 165, 502 N.E. 2d 634. Thus, the question certified to this court in today's cases has already been decided.

However, it is well-established that "[c]ertification of the record of a case to the Supreme Court because of conflict between judgments of Courts of Appeals upon any question, brings the entire case before the Supreme Court for review." *Cook* v. *Ocean Acc. & Guar. Corp.* (1941), 138 Ohio St. 110, 20 O.O. 65, 33 N.E. 2d 9, paragraph one of the syllabus. On this basis, we turn now to a consideration of the remaining issues presented by the cases at bar.

In addition to the First Amendment issues resolved in *Meadows*, *supra*, appellants herein raise additional challenges to the constitutionality of R.C. 2907.323(A)(3) which were not addressed in that decision. In determining the validity of these challenges, we must remain mindful that all legislative enactments enjoy a strong presumption of constitutionality. *State, ex rel. Dunkman*, v. *Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E. 2d 59, paragraph one of the syllabus.

Appellants first argue that R.C. 2907.323(A)(3) violates the constitutional prohibition against vagueness and overbreadth. The statute provides in pertinent part:

"(A) No person shall do any of the following:

"* * *

"(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Appellants contend that the statute is overbroad because it sweeps within its ambit other activities that constitute an exercise of constitutionally protected expression. For example, the use of the term "nudity" is challenged as overly broad, since that term encompasses morally innocent states of nudity as well as lewd exhibitions. Thus, it is argued, the statute fails to define in a sufficiently narrow manner the criminal conduct it prohibits. See, *e.g.*, *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415.

We do not agree with this analysis. The First Amendment doctrine of overbreadth is limited in its application to laws in which the deterrence of protected activities is substantial. Where, as here, a statute regulates conduct rather than pure speech, its overbreadth "* * * must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 615. For the following reasons, we find that R.C. 2907.323(A)(3) is not constitutionally infirm on the basis of overbreadth.

It is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals. Furthermore, we are aware that "* * * nudity, without more is protected expression * * *," even where the subject depicted is a child. *New York* v. *Ferber* (1982), 458 U.S. 747, 765, fn. 18. However, when the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct nar-

rows significantly. The clear purpose of these exceptions, quoted *supra*, is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.

In the area of child pornography, the United States Supreme Court has directed that "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or *authoritatively construed*." (Emphasis added.) *Ferber*, *supra*, at 764. As we construe it today, R.C. 2907.323 (A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.

Appellants further argue that R.C. 2907.323(A)(3) is impermissibly vague in that the term "minor" is not defined with sufficient precision. Appellants contend that in using only the term "minor" without elaboration, the statute fails to limit its proscription to "* * * works that *visually* depict sexual conduct by children below a specified age" (emphasis sic) as mandated by *Ferber*, *Id.* at 764. We cannot agree.

A criminal statute is impermissibly vague only where it is so imprecise and indefinite that persons of ordinary intelligence "* * * must necessarily guess at its meaning and differ as to its application." *Columbus* v. *Thompson* (1971), 25 Ohio St. 2d 26, 54 O.O. 2d 162, 266 N.E. 2d 571, syllabus. See, also, *Connally* v. *General Constr. Co.* (1926), 269 U.S. 385, 391. While R.C. Chapter 2907 does not define the word "minor," this omission is not fatal. Any term which is not defined by a statute is accorded its common, ordinary meaning. *State* v. *Dorso* (1983), 4 Ohio St. 3d 60, 62, 4 OBR 150, 152, 446 N.E. 2d 449, 451. We encounter no difficulty in finding the term "minor" to be generally understood as signifying a person who has not yet attained the age of majority. See Webster's Third New International Dictionary, Unabridged (1986) 1439. The age of majority in Ohio is eighteen. R.C. 3109.01. Therefore, the term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.

Appellants next argue that R.C. 2907.323(A)(3) lacks a requirement of scienter and is therefore unconstitutional. Appellants rely on the statement of the *Ferber* court at 765 that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

Our review of R.C. 2907.323(A)(3) reveals that no particular degree of scienter is specified. The statute differs in this respect from R.C. 2907.321 and 2907.322, which both require "knowledge of the character of the material or performance involved * * *." However, the omission of this element from the delineation of the offense does not render the statute fatally flawed. R.C. 2901.21(B) provides:

"When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense.

When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." (Emphasis added.)

As noted above, R.C. 2907.323(A)(3) does not specify any degree of culpability. Nor does it "* * * plainly indicat[e] a purpose to impose strict liability * * *." Therefore, pursuant to R.C. 2901.21(B), the degree of culpability required to commit the offense is recklessness. *State* v. *Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State* v. *O'Brien* (1987), 30 Ohio St. 3d 122, 124, 30 OBR 436, 437, 508 N.E. 2d 144, 146.

The term "recklessness" is defined in R.C. 2901.22(C):

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

This standard of recklessness is sufficient, in our view, to satisfy the requirement in *Ferber* of "some element of scienter." *Id.* at 765. Scienter is the equivalent of guilty knowledge. *State* v. *Jacobellis* (1962), 173 Ohio St. 22, 18 O.O. 2d 207, 179 N.E. 2d 777, paragraph two of the syllabus, reversed on other grounds (1964), 378 U.S. 184. In *Jacobellis*, this court construed the term "knowingly possess," as used in R.C. 2905.34 (since repealed), as including *both* scienter (guilty knowledge) *and* "mens rea" (guilty purpose). *Id.* Thus, scienter may be a lesser standard than that contained in the term "knowingly." We cannot require the state to prove that the defendant possessed the material in question "knowingly," because innocent motive or purpose is irrelevant to the existence of knowledge as defined in R.C. 2901.22(B). *State* v. *Wenger* (1979), 58 Ohio St. 2d 336, 339, 12 O.O. 3d 309, 311, 390 N.E. 2d 801, 803, fn. 3. By contrast, a motive or purpose may be highly significant to a determination of whether a defendant has violated R.C. 2907.323(A)(3). For example, the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) excuse possession of otherwise outlawed material where the motive or purpose is innocent. Therefore, the degree of culpability required by R.C. 2907.323 (A)(3) is something less than "knowing" possession.

We note that R.C. 2901.22, which defines the various levels of culpability, ranks "recklessly" just below "knowingly" in degree. R.C. 2901.22(E). The definition of recklessness in R.C. 2901.22(C) speaks of a perverse disregard for a *known* risk. Thus, "some element of scienter" is involved, which is all that *Ferber* requires. Accordingly, we find that recklessness is the culpable mental state required to constitute a violation of R.C. 2907.323(A)(3). Implicit in this requirement is the necessity of proving that the defendant had some notice of the character of the material possessed. Our reading of the statute as a whole clearly indicates that only those who are on notice as to the illicit character of the material are subject to criminal penalties. The inclusion of the proper purposes exceptions demonstrates that criminal liability attaches only where possession can have no legitimate purpose.

The state may prove the required notice by demonstrating, for example, the defendant's attempts to conceal the material or to disguise his ownership, his possession of a massive amount of such material, or the ob-

viousness of the character of the material. *Mishkin* v. *New York* (1966), 383 U.S. 502, 511. The state need not prove that the accused was aware of the *actual content* of the material, but only that he was on notice as to its nature or character. See *State* v. *Burgun* (1978), 56 Ohio St. 2d 354, 363-364, 10 O.O. 3d 485, 490-491, 384 N.E. 2d 255, 262.

Appellant Osborne contends that the trial court erred in overruling his motion for acquittal since the essential element of scienter was not proven at trial. However, our review of the record reveals that appellant never objected to the omission of this element from the charge to the jury. Appellant's own proposed jury instructions were completely silent on the element of scienter. Where a party complaining of error could have called, but did not call, the error to the trial court's attention at a timely juncture, the error is waived. *State* v. *Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, paragraph one of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911. In such a case, the alleged error may warrant reversal only if it rose to the level of plain error and prejudiced appellant. *State* v. *Adams*, *supra*, at 153, 16 O.O. 3d at 170, 404 N.E. 2d at 146.

In concluding that the omission of the element of recklessness herein does not constitute plain error, we find support in *Adams*, *supra*. There, the essential element of recklessness was also omitted from the jury charge without a defense objection. This court held that this omission did not *per se* constitute plain error. *Id.* at paragraph two of the syllabus. A case-by-case approach was adopted, in which the record of the case is reviewed to determine whether a manifest miscarriage of justice will result if the conviction is permitted to stand. *Id.* at paragraph three of the syllabus. Our review of the record reveals that appellant himself testified that he gathered the photographs that were the basis of the charge and mounted them in an album, that he had last looked at the album about six months before, and that he had been told that the subject of the photographs was fourteen years old. The photographs themselves depict a nude boy, obviously a minor, in various lewd poses. Given this state of the record, we have no difficulty finding that the jury would have believed, beyond a reasonable doubt, that appellant was aware of the nature of the photographs in his possession. Accordingly, appellant would still have been convicted if a proper instruction on recklessness had been given, and his conviction must stand. *State* v. *Underwood* (1983), 3 Ohio St. 3d 12, 3 OBR 360, 444 N.E. 2d 1332, syllabus.

Appellant Young contends that the indictment in his case is fatally defective, in that no mention is made therein of any element of scienter. The indictment in question states in pertinent part that Young "did possess material that shows a minor * * * in a state of nudity * * * in violation of O.R.C. § 2907.323(A)(3) * * *." In rejecting appellant's contention, we note that appellant pleaded no contest to the charge in the indictment. A plea of no contest "* * * is an admission of the truth of the facts alleged in the indictment * * *." Crim. R. 11(B)(2). By conceding the truth of the facts set forth in the indictment, appellant admitted that the material that formed the basis for the charge was in his possession. In order to admit that the material described in the indictment was in his possession, appellant necessarily admitted his awareness of the possession, and of the nature, of the material described. Our review of the

record reveals that the photographs in question[1] obviously depict a minor in a state of nudity, which in at least one instance constitutes a graphic focus on the genitals. Appellant's conviction must stand.

Appellants next argue that R.C. 2907.323(A) is unconstitutionally vague because it fails to specify whether the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are negative elements to be proven by the state, or affirmative defenses, which must be proven by the accused. However, we find that the "proper purposes" exceptions are clearly intended to be affirmative defenses.

R.C. 2901.05(C) defines an "affirmative defense" as "* * * either of the following:

"(1) A defense expressly designated as affirmative;

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

Neither R.C. 2907.323(A)(3)(a) nor (b) expressly designates the exceptions contained therein as affirmative defenses. However, the exceptions clearly constitute excuses or justifications for the possession of otherwise outlawed material, as they comprise circumstances under which the possession would be legitimate. The existence or nonexistence of a proper purpose is certainly a matter "* * * peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." While proof of proper purpose may come from objective sources, the accused will know better than any other person whether a proper purpose exists, and will be in the best position to adduce relevant evidence. See *State* v. *Doran* (1983), 5 Ohio St. 3d 187, 193, 5 OBR 404, 409-410, 449 N.E. 2d 1295, 1300. Therefore, we hold that the "proper

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[1] Appellant Young contends that the court of appeals erroneously considered these photographs since they were not properly admitted into evidence. The photographs were not marked as state exhibits or formally introduced and admitted. However, we agree with the state's argument that it is not necessary to formally mark, introduce and admit items of evidence when a no contest plea is entered under Crim. R. 11 and R.C. 2937.07.

Crim. R. 11 provides in pertinent part:

"(B) Effect of guilty and no contest pleas. * * *

"* * *

"(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information or complaint * * *."

R.C. 2937.07 provides in pertinent part:

"If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make finding of guilty or not guilty from the explanation of circumstances and if guilt be found, impose or continue for sentence accordingly. * * *"

Crim. R. 11 requires that the defendant accused of a felony be informed of the effect of a plea of no contest. Crim. R. 11(C)(2). Under R.C. 2937.07, the judge may make a finding of guilty from the explanation of the circumstances. Neither provision requires a formal admission of exhibits.

Our review of the record reveals that the photographs were discussed by the parties at the hearing. They were properly considered by the trial court as part of the explanation of the circumstances of the no contest plea. *See Cuyahoga Falls* v. *Bowers* (1984), 9 Ohio St. 3d 148, 9 OBR 438, 459 N.E. 2d 532. As such, they were properly considered on appeal, even though they were not formally admitted as record exhibits.

purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are affirmative defenses within the meaning of R.C. 2901.05(C)(2). Accordingly, the burden of proof rests with the accused. R.C. 2901.05(A).

Appellant Young's final argument regarding the constitutionality of R.C. 2907.323 posits that the sentencing provisions of that statute are disproportionate and constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution. Young contends that since the offense of possessing material showing nude minors is less serious that the offenses set forth in R.C. 2907.321(A)(5)[1] and 2907.322(A)(5),[2] the punishment should be proportionately less severe. Each of these offenses constitutes a misdemeanor of the first degree unless the defendant has previously been convicted of the same offense, in which case the subsequent offense is elevated to a felony of the fourth degree. See R.C. 2907.321(C), 2907.322(C) and 2907.323(B).

"A punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State* v. *Chaffin* (1972), 30 Ohio St. 2d 13, 59 O.O. 2d 51, 282 N.E. 2d 46, paragraph three of the syllabus.

R.C. 2907.323(B) does not mandate a minimum sentence. The trial court, in imposing sentence, may exercise a considerable degree of discretion in determining the precise sentence to impose in a particular case. The court is fully empowered to tailor the punishment to the facts of the case before it, utilizing the usual sentencing criteria set forth in R.C. 2929.13 and 2929.22. Thus, while the classification of the offenses is identical, the punishments may vary considerably according to the circumstances of each case. Moreover, the offense of which appellants have been convicted is a morally abhorrent act made possible only through the cruel exploitation of innocent, abused children. By providing for the possibility of a maximum term of imprisonment of six months for first offenders, R.C. 2929.21(B)(1), the legislature intended not only to express the moral outrage of the community, but also to deter the purchase and possession of child pornography, so that the financial incentive to produce such material would be destroyed. The General Assembly has chosen to prohibit possession as a means of combating the sexual abuse and exploitation of our children. *State* v. *Meadows*, *supra* (28 Ohio St. 3d), at 51, 28 OBR at 153, 503 N.E. 2d at 704. This court is not prepared to state that the punishment imposed for possession of child pornography is disproportionate to the seriousness of the offense.

The First Amendment must remain inviolate. We do not compromise that statement when we find that obscenity is not protected by the First Amendment. *Roth* v. *United States* (1957), 354 U.S. 476, 14 O.O. 2d 331. Likewise, child pornography also is not, and should not be, protected. The state has a compelling interest in the protection of children. Reasonable laws prohibiting the exploitation of children may be passed by the General Assembly to insure that interest.

Appellant Young next argues that the trial court erred in overruling his motion to suppress the photographs seized pursuant to the search warrant, alleging that the information in the underlying affidavit was stale and failed to establish probable cause for the issuance of a warrant. Specifically, appellant alleges that the information in the affidavit was based on statements from two witnesses, one of whom did not give dates for his observation of alleged child pornography in appellant's home, and another whose observations occurred approximately three months before execution of the warrant. We do not agree that this information was so "stale" that the issuing magistrate had no reasonable basis for believing that the materials observed by the two witnesses would still be found at Young's residence. The affidavit recites in detail the circumstances surrounding the observations of the witnesses. It recites that both informants had been "picked up" by Young, who paid them to perform sex acts and to pose in the nude for photographs; that the area specified is known to the affiant as a "pick up spot" for young male prostitutes; that the witnesses had both observed similar material depicting nude minors in Young's home; and that psychological profiles of pedophiles reveal that they do not destroy their child pornography, but rather re-live their sexual experiences through photographs of previous partners.

The alleged staleness of the witnesses' information does not, in our view, affect the validity of the warrant. We note that the affidavit was sworn to within one week after the first witness was interviewed. Given the facts detailed in the affidavit, the issuing magistrate had probable cause for believing the materials described could still be found where they had been observed. In so finding, we are mindful that affidavits for search warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. * * * A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca* (1965), 380 U.S. 102, 108. Under the circumstances of this case, which involves an offense of a continuing nature, we believe that the facts stated in the affidavit justified a finding of probable cause at the time of the issuance of the warrant. *Sgro* v. *United States* (1932), 287 U.S. 206, 210.

Appellant Osborne also attacks the sufficiency of the affidavit underlying the warrant issued in his case. Osborne contends that the affidavit failed to establish probable cause since the information therein was based on unreliable hearsay, and that the affidavit did not specify the time during which the alleged criminal activity took place. As to the time aspect, appellant's contentions are utterly baseless. In a detailed description of the circumstances giving rise to the affiant's belief that Osborne possessed child pornography, it is stated that a few days before the affidavit was sworn, two witnesses stated that the material in question was at that time in the possession of appellant. As to the hearsay element, we note that the use of information based on hearsay is permissible as long as the issuing magistrate is informed of some of the

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[1] R.C. 2907.321 provides in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any obscene material, that has a minor as one of its participants * * *."

[2] R.C. 2907.322 provides in relevant part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality * * *."

circumstances underlying the informant's conclusion that the contraband was where he claimed it to be, and why the affiant found the informant credible. *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114. We find that the affidavit in question passes muster on both counts. Both witnesses named appellant and correctly described his whereabouts. Appellant was also described as an "associate" of one of the witnesses who had just been arrested after a search of the premises retrieved a massive amount of child pornography. A cancelled check made out to appellant, showing appellant's address, was also found on the premises, as well as a mailing list containing the name and address of appellant. These facts gave the magistrate a basis for believing that the informants had reason to know that the contraband was where they claimed it to be, and provided corroboration for the affiant's conclusion that this information was worthy of belief. Thus, the affidavit enabled the magistrate to make a neutral determination of probable cause based on the totality of the circumstances. *Illinois* v. *Gates* (1983), 462 U.S. 213.

Appellant Osborne next contends that the photographs seized in the search were improperly admitted into evidence. He seems to argue that the photographs had to be identified and authenticated by the photographer before they could properly be deemed admissible. This argument borders on the frivolous. The relevance of the photographs is not dependent on whether they accurately depict the subject matter portrayed, but on whether appellant possessed the photographs and whether they are the sort of material outlawed by R.C. 2907.323(A)(3). Verification by the photographer would have no bearing whatsoever on these issues.

Appellant Osborne further argues that no proof was offered that the subject in the photographs was a minor. We cannot agree with appellant's contention that the minority of the person depicted was not demonstrated in the evidence. The majority of the photographs speak for themselves. The person depicted is obviously under the age of eighteen by a substantial margin, and a jury would have been clearly justified in finding, beyond a reasonable doubt, that the subject was a minor. As posession of these photographs alone would support appellant's conviction, we need not consider whether the state proved the minority of the subject in the sole remaining photograph.

Appellant Osborne argues that the trial court erred in failing to instruct the jury that the term "nudity" as used in R.C. 2907.323(A)(3) refers to a lewd exhibition of the genitals. However, since appellant neither requested such a charge nor objected to the instructions as given, any claim of error has been waived. Crim. R. 30; *State* v. *Underwood*, *supra*. Nor does the plain error exception have any relevance here, as the outcome of the trial would clearly have been the same had the trial court instructed the jury that lewdness is a necessary element of nudity under R.C. 2907.323(A)(3), as we hold today. We find that no reasonable juror could believe that the photographs involved herein were anything but a lewd display. See *Underwood*, *supra*, at syllabus.

Accordingly, based upon the foregoing, the judgments of the court of appeals are hereby affirmed.

Judgments affirmed.

MOYER, C.J., SWEENEY, LOCHER, HOLMES, WRIGHT, and H. BROWN, JJ., concur.

BY LEGAL INTERN
JUN 12

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 85AP-945
: (REGULAR CALENDAR)
Clyde Osborne, :
Defendant-Appellant. :

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on June 10, 1986, the assigments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed.

REILLY, NORRIS & LYNCH, JJ.

By _____
Judge Archer E. Reilly

LYNCH, J., Retired, of the Seventh Appellate assigned to active duty under authority of Section 6(C), Article IV, Constitution.

cc: David E. Tingley
Richard Curtner and
Gerald A. Moore

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 85AP-945
Clyde Osborne,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on June 10, 1986

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS and MR. DAVID E. TINGLEY, for appellee.

MR. RICHARD CURTNER and MR. GERALD A. MOORE, for appellant.

APPEAL from the Franklin County Municipal Court.

REILLY, J.

This is an appeal from a conviction in the Franklin County Municipal Court for one count of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(3).

Columbus police officers conducted a search of defendant's home pursuant to a search warrant issued by a judge of the Franklin County Municipal Court on July 22, 1985. They seized a photo album during the search that contained four photos, which were the subject of the conviction involving this appeal.

Several motions were filed prior to trial including a motion to dismiss, a motion to suppress the photographs, and a motion for particular

jury instructions. These motions were overruled. The cause proceeded to trial and a jury returned a verdict of guilty.

Defendant has timely appealed and advances the following assignments of error:

"I. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 11 and 16, of the Ohio Constitution, because this statute is unconstitutionally vague and overbroad on its face.

"II. Appellant's conviction for 'illegal use of a minor in a nudity-oriented material or performance,' pursuant to O.R.C. 2907.323(A)(3), violates appellant's rights under the First and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 11 and 16, of the Ohio Constitution, as applied to appellant because it punishes mere private possession of minor-nudity material.

"III. The trial court erred in overruling appellant's motion to suppress evidence obtained on the basis of the search warrant because the warrant's affidavit was facially defective, violating appellant's rights under the Fourth Amendment to the U.S. Constitution and Article I, Section 14, of the Ohio Constitution.

"IV. The trial court erred to the prejudice of the appellant by admitting into evidence, without authority to do so, irrelevant, unauthenicated photographs for the purpose of proving the age of the person depicted, thus denying the appellant a fair trial and due process of law as guaranteed by Article I, Section 16, of the Ohio Constitution and the Fourteenth Amendment of the U.S. Constitution.

"V. The trial court erred in overruling appellant's motion for a mistrial on the grounds that testimony volunteered by a police officer was in violation of a motion in limine ordering exclusion of evidence relating to postal inspectors, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VI. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of the state's evidence, violating appellant's rights under the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"VII. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29(A) at the end of all the evidence because insufficient evidence of probative value was submitted as to several elements of the crime and because a conviction is against the manifest weight of the evidence, violating appellant's rights under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, of the Ohio Constitution.

"VIII. The trial court's refusal to charge the jury with appellant's requested special jury instructions denied appellant a fair trial in violation of the due process clauses of the Fourteenth Amendment and Article I, Section 16, of the Ohio Constitution.

"IX. Appellant's conviction for mere possession of 'minor-nudity' material, where appellant came into possession of such material years before O.R.C. 2907.323(A)(3) was enacted and where appellant's conduct is entirely passive, violates appellant's rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 16, of the Ohio Constitution."

The first and second assignments of error are considered together, as they are interrelated. Defendant contends that R.C. 2907.323(A)(3) is unconstitutionally vague and overbroad on its face and violates his right to privacy. R.C. 2907.323 provides, in pertinent part:

> "(A) No person shall do any of the following:
>
> "***
>
> "(3) Possess or view any material *** that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
>
> "(a) The material *** is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational,

> religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material ***.
>
> "(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material *** is used ***."

Defendant's challenges to the constitutionality of the statute were previously addressed by this court in two recent decisions: State v. Modeen (April 17, 1986), No. 85AP-907, unreported (1986 Opinions 831); and State v. Sandera (April 24, 1986), No. 85AP-594, unreported (1986 Opinions 942).

In Modeen, this court held that New York v. Ferber (1982), 458 U.S. 747, supports the determination that the United States Constitution does not provide First Amendment protection to a person privately possessing child pornography. This court also construed "state of nudity" to only include lewd exhibitions of the genitals, thus defeating any overbreadth contention. In Sandera, we found that by considering the entire statute, it was apparent that the legislature had defined nudity-oriented material to apply to the depiction of nudity which is devoid of any legitimate purpose. The photographs involved in this case show a young boy in a state of nudity, lewdly exhibiting his genitals. The statute proscribes possession of such photographs.

Thus, defendant's first and second assignments of error are not well-taken.

Defendant contends in the third assignment of error that the court erred by overruling his motion to suppress evidence obtained on the

basis of the search warrant. Defendant maintains that the warrant's affidavit is facially defective because it lacks any indication of when defendant came into possession of the photographs. Moreover, defendant claims that the affidavit contains hearsay which is not credible because it is exculpatory in nature.

The affidavit was signed by Detective James Phillips, who based his testimony on information he received from a Cleveland Postal Inspector, who had in turn received his information from a Florida Postal Inspector. The affidavit indicated that surveillance of an individual in Florida had resulted in the seizure of child pornography there from Jack Smith and another individual, Dan Knous, who had been arrested in Florida. Both men implicated the defendant as possessing negatives of child pornography. During a search of Smith's residence, pursuant to a federal search warrant, a mailing list was seized containing defendant's name and address. Further, a cancelled check made to the order of defendant and dated June 3, 1985 was also seized as part of the search.

Crim. R. 41(C) provides:

> "*** The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. ***"

Defendant asserts that the hearsay statements of Smith and Knous were not reliable because they were exculpatory in nature. The state contends these statements were reliable as they were against penal interests. It is noteworthy, however, that such statements were not the only evidence before the court. There was also the mailing list with defendant's name and a cancelled check. This other evidence, together with the statements of Smith and

Knous was sufficient to establish probable cause when the totality of the circumstances test is applied as required by Illinois v. Gates (1983), 462 U.S. 213.

Defendant further contends that the search warrant affidavit is defective because it does not state when defendant came into possession of the negatives. Hence, there was no probable cause to believe defendant was still in possession at the time the affiant prepared the affidavit.

The facts in the affidavit indicate that Smith and Knous were arrested on July 19, 1985, three days before the warrant was issued. At that time, both men stated that defendant had the negatives. Although it was not established when defendant possessed them, there were sufficient facts to justify the issuance of the warrant. In State v. Marko (1973), 36 Ohio App. 2d 114, this court held that a search warrant is valid and the evidence on which it is based is not stale if law enforcement officers applied for the warrant as soon as they became aware of the location of the evidence. Marko involved a possessory crime which was held to be a continuing offense. This same rationale applies to the facts in the instant case.

Hence, defendant's third assignment of error is not well-taken.

Defendant maintains in the fourth assignment of error, that the court erred in admitting into evidence four photographs. Defendant contends these photographs were irrelevant and unauthenticated as required by Evid. R. 901.

This allegation is not well-taken. The photographs were relevant since defendant was charged with possessing material that showed a minor in a state of nudity. Possessing the photographs was, consequently,

the substance of the charge, and the photographs were definitely relevant evidence. As to the authentication issue, defendant seems to contend that these photographs had to be authenticated by the photographer before they were admissible. Such a requirement would unduly limit the effect of R.C. 2907.323(A)(3). Detective Phillips testified that the photographs were found in defendant's home. Defendant also testified that the photographs were given to him by a friend, that he arranged them in a photo album and that the album was kept in his residence. This was sufficient identification to render the photographs admissible.

Defendant's fourth assignment of error is not well-taken.

Defendant contends in his fifth assignment of error that the court erred in failing to declare a mistrial when a witness testified in violation of a motion in limine. The court granted a motion in limine before trial excluding any evidence as to the basis for the search warrant. Defense counsel sought to exclude any evidence of additional federal charges regarding misuse of the mail. During the testimony of Detective Phillips, the officer was asked whether in executing the search warrant there were several officers present. Detective Phillips responded that there were three other officers and two postal inspectors. Following defense counsel's motion for a mistrial, the court, in denying the motion, found that the motion in limine barred evidence that the police had received any information from the postal inspectors for the search warrant. The court further found that Detective Phillips' answer was not in direct violation of the order and was not prejudicial to defendant.

The trial court's ruling was correct. As stated in State v. Hymore (1967), 9 Ohio St. 2d 122, at 128:

> "The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere."

Considering the trial court's proper finding that this testimony was not in direct violation of the motion in limine, and that defendant was not materially prejudiced by this evidence, there was no abuse of discretion.

Defendant's fifth assignment of error is also not well-taken.

In the sixth and seventh assignments of error, defendant contends that the court erred in overruling his Crim. R. 29(A) motion for acquittal for several reasons. Defendant first claims that there was no evidence that the material he possessed showed a "minor" as required by R.C. 2907.323. Nevertheless, Detective Phillips testified that the defendant told him he thought the boy in the photograph was fourteen years old when the pictures were taken. Moreover, the photographs speak for themselves as they manifestly show a young boy. The defendant further contends that the state did not establish that the boy in the photographs was not the defendant's child or ward. Defendant himself testified that the boy was not in either category.

Finally, defendant maintains that the state failed to present any evidence that the exceptions in R.C. 2907.323(A)(3) did not apply to defendant. A review of the transcript reveals that the state presented sufficient evidence to establish a prima facie case against defendant; that he possessed a depiction of a child in a state of nudity and that the depiction involved lewdness, eroticism, lechery, salaciousness, voyeurism or other exploitive, unwholesome motivations. See Sandera, supra. If the

defendant wished to contravene that prima facie case, it was incumbent upon him to introduce evidence that the depiction served one of the legitimate purposes set out in R.C. 2907.323(A)(3)(a) or (b).

Whereupon, defendant's sixth and seventh assignments of error are not well-taken.

Defendant maintains, in the eighth assignment of error, that the court erred in refusing to give requested instructions to the jury. Defendant requested the court to instruct the jury that a minor was a person not over fifteen years of age. Defendant cites R.C. 2907.04, 2907.21, and 2907.22 in support of his contention. R.C. 2907.04 defines corruption of a minor, whereas, R.C. 2907.21 and 2907.22 relate to prostitution. Although these statutues increase the penalty for conduct with minors less than sixteen years of age, the committee comments following thereafter explain that the prohibited conduct is considered more harmful to persons in early adolescence. They do not permit similar conduct with those over sixteen years of age. Thus, the term "minor" takes on an atypical meaning for purposes of those statutes, as it is only meant to refer to those under sixteen years of age.

The term "minor" is not specifically defined in the criminal code. Nonetheless, R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. ***" The common and ordinary meaning of the term "minor" is a person under the age of eighteen years. This is the definition the court gave to the term "minor," which was a correct definition. Further there was sufficient evidence for the jury to find that the boy involved in these photographs was not over fourteen years old.

Defendant also requested the court to read the entire statute in its charge to the jury. The court refused in the absence of evidence on any of the exceptions. Although it is perhaps a better practice to read the statute and exceptions together, considering this court's holding in Sandera, supra, there was no prejudicial error in this case by the court's refusal to do so. There was no evidence presented requiring the jury to determine whether one of the exceptions applied to defendant. Furthermore, the photographs plainly met the definition of lewd exhibition of genitals.

Defendant's eighth assignment of error is not well-taken.

In the final assignment of error, defendant asserts that his conviction violates due process because he came into possession of the prohibited material prior to the effective date of the statute. As noted above, a possessory offense is a continuing offense. Defendant was charged with possessing the materials on July 22, 1985. The evidence presented at trial was sufficient for the jury to find defendant guilty of the proscribed conduct. We find no denial of due procees in this case.

Defendant's ninth assignment of error is not well-taken.

For the foregoing reasons, defendant's assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

NORRIS and LYNCH, JJ., concur.

LYNCH, J., retired, of the Seventh Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Constitution, in the Tenth Appellate District.

No. _____

FRANKLIN COUNTY
MUNICIPAL COURT
Columbus, Ohio

THE STATE OF OHIO

vs.

North Park Street
Apt. #3
Columbus, Ohio 43213

SEARCH WARRANT
Daytime/Nighttime, and Ordered
Issue of the Court

TED HYSELL
Clerk of the Municipal Court
By: _____ Deputy

Ordered on Affidavit of
Det. James Phillips
CPD—Child Porno Task Force

FILED
'83 JUL 22 PM 7 22
CLERK

WARRANT TO SEARCH

THE STATE OF OHIO,
FRANKLIN COUNTY,
CITY OF COLUMBUS, } ss.

To the Chief of Police of the City of Columbus, Ohio, Greetings:

WHEREAS, there has been filed with me an affidavit, a copy of which appears on the reverse side, these are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime ~~(or nighttime)~~ into premises known as

793 North Park Street, Apt. #3,
Columbus, Ohio 43213

and to execute a search of the said premises within 5 days after the issuance of this warrant. The said premises being in the City of Columbus, Ohio, aforesaid, and there diligently search for (the said goods, chattels, or articles), to-wit:

Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Kraus or Century 20th Studios or P. O. Box 3039, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studios.

and that you bring the same or any part thereof, found on such search, forthwith before me, or some other judge of this court having cognizance thereof, to be disposed of and dealt with according to law.

Marvin D. Ramoff
Judge Franklin County Municipal Court, Columbus, Ohio
7/22/83 at 5:33 P.M.

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SEARCH — WARRANT AFFIDAVIT

THE STATE OF OHIO,
FRANKLIN COUNTY,
CITY OF COLUMBUS, } ss. Franklin County Municipal Court, Columbus, Ohio

Before me, the undersigned, a Judge of Franklin County Municipal Court, Columbus, Ohio, personally appeared Det. James Phillips, CPD
Child Porno Task Force

who being duly sworn according to law, deposes and says that he has good cause to believe and does believe that

Negatives of minor children engaged in sexual activity or nudity; photos of minor children engaged in sexual activity or nudity; correspondence between Clyde Osbourne and Jack S. Smith, Daniel Kraus or Century 20th Studios or P. O. Box 3039, Holiday, Florida; cancelled checks involving Clyde Osbourne, Jack S. Smith, or Century 20th Studios.

are being kept in a certain building or room or location described as follows, to-wit: 793 North Park Street, #3 Apartment, Columbus, Ohio 43213

in said City of Columbus, Ohio, in violation of section 2907.321, 2907.322, 2907.323, O.R.C.,
as fruits, evidence or instruments

The facts upon which such belief is based are as follows: on 7-22-83 the affiant spoke with U.S. Postal Inspector Paul M. Hartman, Cleveland, Ohio, who related the following to the affiant: On or about June 11, 1982 U.S. Postal Inspector P.M. Hartman, Cleveland, Ohio, initiated test correspondence with Century 20th Studios, P. O. Box 3039, Holiday, Florida 33590. In such correspondence Jack S. Smith, a principle in Century 20th Studios, offered inspector Hartman various photographs depicting sexually explicit activity between adults and minors. In an item of correspondence dated June 13, 1983, Smith wrote to inspector Hartman "At (Continued, & attachment 28)

And requests that search be made in the daytime (or nighttime) and that warrant authorize seizing the articles described above, if found, and bring same or any part thereof before this Court or any other court having cognizance thereof, to be disposed of according to law.

Det. James Phillips #73
Affiant

Sworn to before me and subscribed in my presence this 22nd *day* July
A. D. 19 83.

Marvin D. Ramoff
Judge Franklin County Municipal Court, Columbus, Ohio

Date: 7/22/83
Time: 5:35 p.m.

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The facts upon which such belief is based are as follows: [illegible] time I had an extensive collection of male/female action photographs, male/male action pictures, also, however, all such prints were sold out through an ad in the Advocate. I cannot have any copies made in as much as the negatives are in possession of a friend of mine in Ohio. I had over 1,000 negatives of both hard and soft core photographs and I still retain ownership of same and, no doubt, will have them back within a short period of time. However, as suggested, please write to me and let me know what type photographs you are interested in. All models used are young - both boys and girls."

On or about July 13, 1983 Postal Inspector P.M. Hartman mailed a test letter, addressed to Box Holder, P. O. Box 3034, Holiday, Florida 33590, under cover to Postal Inspector Daniel Witonski. Such test letter contained an original U.S. money order issued in the amount of $10.00 pre-payment for photographs of minors engaged in sexually explicit conduct.

On or about July 17, 1983 Postal Inspector Daniel Witonski placed the above described test letter into P. O. Box 3034, Holiday, Florida and maintained visual surveillance of said P.O. Box. During the course of that surveillance, Inspector Witonski observed Jack S. Smith remove said test letter from said Post Office Box and proceed directly to Smith's residence.

Inspector Witonski and other officers maintained a continual surveillance of the Smith residence until approximately 1 1/2 hours later when Smith emerged from the residence and entered his vehicle. Inspector Witonski continued to maintain the surveillance of the activities of Jack S. Smith and followed Smith directly to the Holiday Florida Post Office. Upon arrival at the Holiday Florida Post Office, Smith was observed by Inspector Witonski to deposit into the mails, two letters. At such time that these observations were made, Inspector Witonski terminated the surveillance.

Inspector Witonski then made a visual observation of the mail receptacle into which Smith deposited the above described two letters. Such observation disclosed the presence of a

Det James A Bolton 777

Sworn to before me and subscribed in my presence this 22 day July

A.D. 1983

Marvin L. Resnick

Judge Franklin County Municipal Court, Columbus, Ohio

7-22-83

5:35 p.m.

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ATTACHMENT #2 continued

of a letter bearing the return address of P. O. Box 3034, Holiday, Florida 33590 addressed to the confidential test name and address employed by Inspector P. M. Hartman in the conduct of this investigation. Inspector Witonski removed this said letter from the U.S. mails and having been so authorized by Inspector P. M. Hartman, opened said letter.

Upon opening said letter, Inspector Witonski found said letter to contain a two-page item of correspondence endorsed "Jack Smith" and 20 color photographs depicting minors below the age of 18 years engaged in sexually explicit conduct. Further searches of these photographs depicted sexual contact between minor females and an adult white male later identified by Inspector Witonski as Daniel S. Knaus, also a principle in Century 20th Studios.

On or about July 19, 1983, Postal Inspector Daniel Witonski and other officers executed a federal search warrant upon the premises of the Smith residence and arrested Jack S. Smith and Daniel S. Knaus on federal charges arising from the use of the U.S. mails to distribute child pornography materials. During the conduct of the search Inspector Witonski discovered thousands of photographs depicting minors engaging in sexually explicit conduct as well as various records, papers and correspondence bearing upon the sale of such photographs.

Following his arrest, Jack S. Smith was advised of his Constitutional Rights per the Miranda decision and was questioned by Inspector Witonski as to the location whereat the photographic negatives, which were the source of such photos were secreted. Smith responded "they're with a friend of mine in Ohio named Clyde."

Similarly, Daniel S. Knaus was advised of his Constitutional Rights following his arrest and was also questioned by Inspector Witonski concerning the location whereat the photographic negatives from which such photographs had been produced were secreted. Knaus related to Inspector Witonski that all such negatives were in possession of an associate of Smith's named Clyde Osborne, who resides in the Columbus, Ohio area.

During the conduct of the execution of said search warrant, Inspector Witonski located various mailing lists, one of such mailing lists including the name address of Clyde Osborne, 793 North Park Street, #3, Columbus, Ohio 43213.

Further, on the morning of 7-22-83, while reviewing evidence seized incident to the execution of a federal warrant at the Smith residence, Inspector Witonski located a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.30 dated 6-3-83. A review of the reverse of said cancelled check disclosed that the address of 793 North Park Street, #3, Columbus, Ohio 43213, was inscribed thereon. Further, a review of said cancelled check disclosed that said check was stated at Christie's Market, 680 North High Street, Columbus, Ohio telephone 229-[illegible].

Det James A Bolton 777
Police Officer

Sworn to before me and subscribed in my presence this 22nd day July

A.D. 1983.

Marvin L. Resnick
Judge Franklin County Municipal Court
Columbus, Ohio

7-22-83
5:35 --

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RET . N[illegible] RECEIPT, INVENTORY OF SEARCH WARRANT

THE STATE OF OHIO,
FRANKLIN COUNTY, } ss.
CITY OF COLUMBUS }

I, the officer taking property hereunder, received the attached search warrant on July 22,
19 83, and executed it as follows: On 7-22, 1983, at [illegible] o'clock P.M., I searched the
N. Park St., #3 described in the warrant and left a copy of the warrant (with/or)
(the premises searched)
Clyde Osborne
(name of person in charge of premises when left or the place of search)
together with a copy of this inventory and Receipt for the items seized. The following is
an INVENTORY of property taken pursuant to the warrant and prepared by Lt T.A. Phillips
(officer taking property)

Letter To Jack Smith
Brown Envelope Containing Negatives
Brown Photo Albums
Misc. Photos
Kodachrom Film
Photo From Frame Behind
Brown
Letters
Lubitel 2 120 Camera Case & Flash
Misc News Clippings
Ohio Gay Guide.

FILED
1983 JUL 22 PM 1:22
CLERK OF COURTS
FRANKLIN COUNTY, OHIO

This inventory was made in the presence of (Circle one) 1. [illegible] the applicant for
the warrant and [illegible] the person from whose possession (or) from whose premises
the property was taken. 2. [illegible] (name) and [illegible] (name), acting in the absence of [illegible]
(applicant or person from whom ...)

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant
and a copy of this inventory was deposited with the person or the premises from which the property was
taken or a Receipt of the items taken

[illegible]
(Signature of officer taking)

Subscribed and sworn to and returned before me this [illegible] day of [illegible], 19[illegible]

[illegible]
(Notary Public)

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